IN THE

Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

Appellant,

THE STATE OF CALIFORNIA,

Appellee.

Appeal From the Court of Appeal of California,
Second Appellate District.

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Appellant's Petition for Rehearing With Brief Annexed.

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Charles H. Keating, Jr., (hereinafter referred to as Moving Party), respectfully moves for leave to file a brief as *amicus curiae* in support of appellee, the State of California, in its petition for rehearing on file herein. The consent of the City Attorney of the City of Los Angeles, counsel for appellee, has been obtained, and has been filed with this Court. The consent of Melville B. Nimmer, counsel for appellants, has been requested and was refused.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting law enforcement in combatting the spread of obscenity in the nation; first, as

the founder and co-counsel for Citizens for Decent Literature, Inc., and more recently, as a member on the Presidential Commission on Obscenity and Pornography. Although the majority opinion herein denies that an obscenity issue is present in this case.[1] Moving Party submits that such ruling is not supported by the basic principles upon which the obscenity crime is grounded. Such lack of support is apparent from the face of the opinion which fails to identify any case authority which requires that proposition as a rule of law.[2] It is Moving Party's contention that an examination of the development of the obscenity charge from its historical origin in *LeRoy v. Sedley*, 1 Sed. 168, 82 Eng. Reports 1036 (K.B. 1663) (arising as it did out of the common law concept of "breach of the peace", from which California Penal Code section 415, herein considered, was derived) and the succeeding three hundred and eight years of law enforcement

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[1]Associate Justice Harlan's opinion reads in part:

> "This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States*, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket . . ."

[2]*Roth v. U.S.*, 354 U.S. 476 (1957), which is the only authority cited in the Harlan opinion in support of such a holding, does not even mention the word "erotic", much less designate its equivalent as one of the delimiting boundaries of Roth. On the contrary, the *Roth* opinion, at footnote 20, adopts the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code section 207.10(2) which holds that the sexual conduct being proscribed may be that which causes ordinary adults to respond with feeling of aversion, repugnance, shame or disgust, such as those dealing with the excretory function. See Morals Offenses and the Model Penal Code by Louis B. Schwartz in 63 Columbia L.R. 669 at p. 679, discussed *infra* at page 33.

which adhere to the principles arrived at in *Leroy v. Sedley,* suggest that the cavalier manner in which the majority opinion discarded the "obscenity" consideration does violence to established legal principles.

Moving Party is apprehensive that the decision in *Cohen v. California,* if allowed to stand, will cause even greater havoc in this nation's courts than did the analysis of the majority opinion in *Stanley v. Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (April 7, 1969). It took two years for this Honorable Court to correct the misguidance flowing from the *Stanley* opinion. See *United States v. 37 Photographs,* .... U.S. .... 28 L. Ed. 2d 822, 91 S. Ct. .... (May 3, 1971). The damage done to this nation's standards of public decency as a result of the *Stanley* opinion is incalculable and it would be impossible to estimate the time that it will take to repair such damage, if indeed, such is at all possible.[3] Moving Party submits that, if at this time, another "Stanley" situation is unleashed upon this nation's courts, the harm to the rule of law, upon which this nation is grounded, and the moral fiber of this nation will be immeasurably greater.

Moving Party recognizes the inherent improbabilities of this Court's granting a rehearing on the matter herein, yet feels compelled in this amicus brief to address

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[3]See *Roth v. U.S.,* 354 U.S. 476 at 490, footnote 28, and the individual views of Senator Hugh Scott in Report No. 1097 of the Committee on the Judiciary, dated April 29, 1968, on the Omnibus Crime Control and Safe Streets Act of 1967, 90th Congress, 2nd session at page 213:

> "To those who say that a Court decision cannot 'cause' crime, I would remind them of the excellent communication system of the underworld, the so-called grapevine of the prison 'sea lawyers'. One need not be a legal scholar to sense the tendency of the law, and where it is felt that a 'technicality' will prevent prosecution, the result is bolder action . . ."

himself to that objective in the hope that Justice Harlan, can be persuaded to recant.[4] It is Moving Party's hope that Justice Harlan will recall to mind his vote with the majority in *Stanley* and the aberrations that crept into the law as a result of that opinion, and would be willing to reexamine his vote in *Cohen* in the light of the can of worms that that decision is certain to open.

Two years ago, Moving Party had serious doubts that Justice Harlan acceded to everything that the majority opinion in *Stanley* could be read as saying and, based thereon, prepared a draft of a petition for rehearing for the State of Georgia, which was aimed at informing Justice Harlan of such interpretations. The petition was never filed with this Court inasmuch as counsel for the State of Georgia was unwilling to give this Court an opportunity to rule against him further. In retrospect, Moving Party considers that it was an error in judgment that the same was not brought to the attention of this Court in the form of an independent petition requesting this Court to reconsider the matter on its own motion for it would have focused the attention of Justice Harlan and others on the legal aberrations which were to follow from the language of the *Stanley* opinion.[5]

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[4]Rule 58 of the U.S. Supreme Court provides in part as to rehearings:

> "A petition for rehearing . . . will not be granted, except at the instance of a justice who concurred in the judgment or decision, and with the concurrence of a majority of the Court . . ."

Moving party understands this to mean that a rehearing would be in order if Justice Harlan were to reexamine his position.

[5]An information copy was transmitted to the Clerk of the Georgia Supreme Court two months after the *Stanley* decision, as being of academic interest to that Court. A copy of the latter

It is Moving Party's contention that, as in *Stanley*, the espousals of the Harlan opinion in *Cohen* run contrary to Justice Harlan's basic philosophy. Justice Harlan has always respected the inherent rights of government under the tenth amendment and regarded the judicial systems of the several States as testing grounds in the search for truth and justice. The *Cohen* opinion does violence to those tenets.

If, in spite of this nation's laws outlawing "lewd conduct", an individual has an absolute right to broadcast to the public his opposition to any cause or principal by employing lewd language such as "F— the (cause or principal)" and "the State may not, consistently with the First and Fourteenth Amendment, make the public display of such a single four-letter expletive a criminal offense" and the public (in this case, those in the Los Angeles Court House) are required to "avoid further bombardment of their sensibilities simply by averting their eyes" because the state cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process" then surely Justice Harlan's opinion has opened Pandora's Box, and in the same stroke succeeded in painting this Court into a corner. See Rule 40(5) of the Rules of the Supreme Court of the United States which provide in part, as follows:

> "5. Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."

In the light of the *Cohen* rationale, how can this Court justify the limitations on free speech imposed by

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communication dated June 18, 1969 together with the petition which was drafted on the *Stanley* matter is attached to this brief as Appendix A.

Rule 40(5)—particularly, in light of the fact that the business of the Supreme Court offers a forum which symbolizes the essence in the exchange of ideas. If the State cannot regulate objective "lewd conduct" in the public corridor of its buildings, how can this Court accomplish that task in its own Courtroom "without also running a substantial risk of suppressing ideas in the process?" or, as in the case of the legendary fable of "The Partial Judge," does the answer to the constitutional question depend upon whose ox is gored. What is this Court prepared to say the rule of law will be when some disgruntled person, be he litigant or observer, decides to don his jacket in the manner of Cohen, and broadcast a message to the members of this Court and the spectators in attendance. This is not a fanciful inquiry, for only a naive person would fail to recognize the historical significance of the tool of "lewdness" as an instrument of revolution. See *Dillingham v. State of Maryland*, 267 A. 2d 277 (July 15, 1970) where the editor of the Washington Free Press resorted to "lewdness" in his attack on a trial judge; at page 72.

On March 21, 1969, appellant was arrested in front of the Montgomery County Police Headquarters for selling a detective an issue of the *Washington Free Press* newspaper, Vol. 2, No. 52, March 15-31, 1969. On page three of the issue, at the top of the page in bold block letters approximately one inch high, there is the headline "Dear Judge Pugh" and in smaller print "pages 9-15". On page nine of the issue, in white letters approximately one and one-eighth inch high, on a black background, there is the headline "A Pornobiography." In the lower center portion of that page,

there is a cartoon approximately four and one-quarter inches square which shows a nude human figure (purported to be Judge James H. Pugh of the Circuit Court for Montgomery County) masturbating. The cartoon shows the human figure sitting on a large chair with a swastika on it, in front of a podium or lectern on which are hanging various items such as a hypodermic needle and a whip. The entire cartoon, including the human figure, is a line-type drawing, being very simple artistically and out of natural proportions. The human figure is abstract in an artistic sense, bearing only moderate resemblance to actual human form. The limbs and general anatomy are out of proportion, there is no hair on the head, and the face is expressionless. Above the figure but within the four and one-quarter inch square of the cartoon is the caption "HE' COMM D'JUDJE" [sic]. Surrounding the cartoon in a box ten inches by four and three-quarter inches is a biography of personal facts concerning Judge Pugh, e.g. club memberships, home address, and alleged conflicts of interests. Surrounding the cartoon and biographical material on the rest of the page is a critique in hostile terms of Judge Pugh in his professional capacity; the entire page measures seventeen inches by approximately eleven and one-half inches. Page nine is one of twenty-four pages in the total newspaper. Pages 10 to 15 are apparently intended as a continuation of the critique of the judicial system in general begun on page nine. A summary of the newspaper and the expert testimony is shown in the appendixes.

As an example of the type of "lewd" conduct, which is widespread on the nation's campuses, and affected by this decision, see *Goldberg v. Regents of the University of California,* 57 Cal. Rptr. 463 (Feb. 28, 1967). Hearing in the California Supreme Court denied on April 26, 1967 and *State of Delaware v. Ceci,* 255 A. 2d 700 (May 29, 1969). For a representative example of how the Harlan rationale will effect other areas, see the opinion of Court of Appeal's Justice Jones in *In Re Perlman,* ..... *Cal. Rptr.* ....., ... Cal. App. 2d ..... (June 18, 1971), handed down *after* this Court's decision in *Cohen,* granting a habeas corpus writ after conviction and affirmance on appeal on an obscenity charge for exhibiting the four letter word in a sign on the rear of petitioner's automobile.

It is respectfully requested that the applicant herein, Charles H. Keating Jr., be granted leave to file a brief amicus curiae, setting forth arguments on the above, and related issues in the cause herein.

Dated July 2, 1971.

CHARLES H. KEATING JR.,
Amicus Curiae.

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Brief Amicus Curiae of Charles H. Keating, Jr., in Support of Appellee's Petition for Rehearing.

Statement of the Case.

The record of the trial proceedings below, was before this Court by way of a settled Statement on Appeal (Appendix pp. 18-21). That statement reveals the following facts in support of the conviction: On the night of April 25, 1968, Appellant Cohen met with a group of friends and acquaintances who suggested the need to inform the public of their opposition to the Vietnam War, and to the Draft. Immediately following such discussion, some of those in attendance, but other than the Appellant, placed the words "Fuck the Draft" on Appellant's jacket as well as a "peace symbol" consisting of a circle with a verticle line running through

the circle, and two diagonal lines meeting the verticle line in the lower portion of the circle. Appellant placed a second "peace symbol" on the jacket. On the following day, April 26, Appellant was observed by Sergeant Splawn in the Courthouse corridor outside Division 20 wearing the said jacket with the words "Fuck the Draft". Women and children were present in the said corridor. Appellant entered the Courtroom of Division 20 where he removed his jacket, and held it folded over his arm. When the Appellant emerged from the courtroom into the Courthouse corridor, Sergeant Splawn placed the Appellant under arrest. Appellant stated that by wearing the said jacket the public was made aware of the depth of feeling against the draft shared by himself and his friends.

On April 29, 1968 a complaint was filed charging the Appellant with having committed a misdemeanor, on April 26, 1968 at Los Angeles, California to wit: violation of section 415 of the California Penal Code. Penal Code section 415 reads as follows:

> § 415. *Disturbing the peace; noise; use of public streets of unincorporated town for offensive conduct, horse racing, or shooting; indecent language; punishment*
>
> *Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by* loud or unusual noise, or by tumultuous or *offensive conduct,* or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or

pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, *is guilty of a misdemeanor,* and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court (our emphasis).

The complaint against Paul Robert Cohen read as follows (Appendix, p. 1):

> Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about Apr. 26, 1968, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: VIOLATION of Section 415 of the Penal Code of the State of California was committed by PAUL ROBERT COHEN (Whose true name to affiant is unknown), who at the time and place last aforesaid, *did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of this complainant and other persons then and there being present, by then and there, engaging in* tumultuous and *offensive conduct*. All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant that he may be dealt with according to law. (our emphasis).

Subscribed and sworn to before me on Apr. 29, 1968.

/s/ H. A. Spearman
H. A. SPEARMAN
GEORGE J. BARBOUR
Clerk of the Municipal
Court of Los Angeles
Judicial District, in said
County and State

By.....
Deputy Clerk

During the course of the trial the court made the following rulings (Appendix, p. 20):

> "1. The Court held that 'tumultuous or offensive conduct' within the meaning of Penal Code section 415 may consist of written words unaccompanied by any actual or threatened violence."
>
> "5. The Court held, as a matter of law, that the words 'Fuck the Draft' are obscene within the Constitutional meaning of that word".

The Trial Court found the Appellant guilty as charged, and sentenced him to thirty days in jail. The Appellate Department of the Superior Court reversed the conviction, but certified to the Court of Appeal the question of law upon which the reversal was based: The question presented was: "Does conduct which may be "offensive" but lacks any aspect of being "tumultuous" violate Penal Code section 415, covering disturbances of the peace?

In the Court of Appeal, Appellant contended that the offense of disturbance of the peace does not exist

without actual or threatened violence or behavior which is likely to create a disturbance. The Court of Appeal in *People v. Cohen,* 1 Cal. App. 3d 94; 81 Cal. Rptr. 503, 506, agreed with this statement of the law (Appendix, p. 28), but reached a different conclusion in applying the law to the facts, holding at page 506:

> "Thus, under section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet is guilty of disturbing the peace although his own conduct, while offensive, was not in itself violent.
>
> In the matter before us the defendant deliberately wore a jacket emblazoned with language which is clearly offensive and below the 'minimum standard of propriety and the accepted norm of public behavior' (Goldberg v. Regents of University of California, 248 Cal.App.2d 867, 880, 57 Cal.Rptr. 463) at least when paraded through a courthouse corridor containing women and children. The defendant's conduct consisted of more than a quiet and peaceful assertion of his convictions about the draft. He carefully chose the forum for his views where his conduct would have an effective shock impact. The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft. The expression he chose to display on his jacket is one which is not used publicly to espouse a philosophy or a personal conviction. He was intent upon attracting the attention of others to his views by the sheer vulgarity of his expression. He must have been aware that his behavior would vex and annoy a substantial portion of his unwilling 'audience'. His

conduct was, therefore, malicious under Penal Code section 7.[2]

It was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket. The fact that the police intervened and that the defendant was arrested before violence occurred does not make his conduct any the less provocative. We think it also a reasonable inference from the time and place of defendant's act that he intended to provoke disorder.

It is our conclusion that the defendant's acts constituted the type of offensive conduct prohibited by section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace.

It is also our view that is is not a valid defense to a charge of disturbing the peace that the defendant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause others to commit violent acts or disturb the peace."

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[2]Penal Code section 7 provides in part as follows:

"* * * The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; * * *."

The California Supreme Court declined review by a divided vote. This Court postponed the question of jurisdiction to a hearing of the case on the merits, 399 U.S. 904, and after argument, noted in its opinion that jurisdiction had properly been invoked on Cohen's claim that, "as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution."

ARGUMENT.

I.

As Construed to Apply to the Facts of This Case, California Penal Code Section 415 Did Not Infringe Appellant's Rights to Freedom of Expression, as Guaranteed by the First and Fourteenth Amendments of the Federal Constitution.

A. The Construction of California Penal Code Section 415 Adopted by the Court of Appeal as to the Legal Connotation of "Offensive Conduct" Is Binding on This Court.

In its opinion in *People v. Cohen*, 81 Cal. Rptr. 503, 1 Cal. App. 3d 94 (Oct. 22, 1969), the Court of Appeal, in construing California Penal Code section 415, ruled as follows:

> "Breach of the peace and disturbing the peace are synonymous terms. Section 415 when enacted in 1872 was a codification of the existing common law crime of breach of the peace. Therefore, in resolving the novel question presented us, *we can look to the common law to assist us in assaying the legislative intent behind the use of the words 'offensive conduct'*". (Our emphasis).

Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court must accept the state court's construction and proceed to test the validity on that basis. *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents*, 360 U.S. 648, 688. See also this court's review of the judicial gloss placed by state and federal courts on the language employed in obscenity statutes in *Roth-Alberts*, 354 U.S. 476.

Those portions of the majority opinion herein reading:

> "No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created"

and

> ". . . and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person' . . ."

fly in the face of the ruling of the Court of Appeal and the rule of construction expressed by this Court in *Blodgett (supra)* and *Kingsley Pictures Corporation (supra)*.

B. The Construction of Penal Code Section 415, Applied by the Court of Appeal Is Nothing More Than a Classical Application of the Common Law Crime of "Breach of the Peace".

In his textbook on criminal law, Professor Rollin M. Perkins discusses California Penal Code section 415 and its relation to the common law crime of "breach of the peace" as follows:[1]

> The beginning of our criminal justice, in the troublous days of the dawn of civilization on the British Isles, was concerned very largely with the problem of keeping the peace. Because of this fact all early indictments included some such

[1]Criminal Law, by Rollin M. Perkins, The Foundation Press Inc., (1957) at pages 340, 341.

phrase as "against the peace of the King;" and until recent statutory provisions for simplification, indictments in this country were thought to be incomplete without some such conclusion as "against the peace and dignity of the state." As a result of this history all indictable offenses are sometimes regarded as deeds which violate the public peace, and hence in a loose sense the term "breach of the peace" is regarded as a synonym for crime. On the other hand there is a very obvious distinction in this regard between a secret act of embezzlement and the public tumult of a riot. The secret act of embezzlement does not disturb the public peace except in a purely theoretical sense. Our present concern is not with offenses which disturb the peace only theoretically, but with *those crimes which are punished primarily because of their actual disturbance of the public tranquillity, or their tendency to cause such a disturbance. Needless to say, there is a* social interest in *preserving the peace and tranquillity of the community*[4] and the common *law provided a penalty for any wilful deed* which violates this *interest without lawful justification or excuse.* If such a deed also violates some other social interest, such as the social interest in protecting the persons of individuals, the crime is commonly classified under some other appropriate heading. If such is not the fact, and the deed is punished primarily because of the violation of the social interest in the public peace and security, the offense may have some special name such as riot, affray, or disturbance of public assembly. If the deed is punished primarily because of the violation of

this social interest, and there is no other special name for the particular offense, the phrase "breach of the peace" or "disturbing the peace" is used as the name of the crime itself. Stated in other words:

> *Any wilful deed committed without lawful justification or excuse, which unreasonably disturbed the public peace and tranquillity, or tended strongly to cause such a disturbance, was an offense at common* law; and unless there was some special name for the misdeed, it was called a "breach of the peace." Some statutes follow this same plan; others employ some other label for each offense within this field and use "breach of the peace" only as part of the *description of various* misdeeds known by such other names. (Our emphasis).

At footnote 4 of the above text, the author noted:

> 4. "The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society." 1 Bl. Comm. *349. "They attack directly that public order and sense of security, which is one of the first objects of the common law. . . ." State v. Huntley, 25 N.C. 418, 421 (1843).

It is interesting to note, in connection with Cohen's conduct in this case, that the first obscene exhibition crime reported under our English system, was one which was introduced to the common law courts on the theory of a "breach of the peace", the same situation that exists herein. See *LeRoy v. Sedley*, 1 Sed. 168, 82 Eng. Rep. 1036 (K.B. 1663). The issue in

Sedley which perplexed the House of Lords was the lack of evidence of "force" in connection with Sedley's exposure of his person, and obscene address to the Covent Garden community. There, as here, the argument was made that those present might choose whether or not they would look upon him. See the comment of Justice Reynold in *Rex v. Curl,* 2 Strange 792. It was finally decided in *Sedley's* case that force was not an essential ingredient of the criminal charge, and that such public conduct was criminal for the reason that it was in contravention of the public morals, as defined by the Court, which was the custodian of the public morals. See *Rex v. Curl,* 2 Strange 789 (1727). It was from *Sedley* and *Curl* that the common law judges arrived at their judicial authority to declare certain public conduct to be illegal as a *matter of law.* See 75 Harvard L. R. 1652 at 1653; and it was from such precedents that California trial judge James Harvey Brown, herein, was empowered by the California judicial system to declare Cohen's written words of "Fuck the draft" to be obscene as a *matter of law,* and that Court of Appeal Judges Alarcon, Roth, and Fleming herein were empowered to declare as a *matter of law,* that the same was language which was "lewd" and "below the minimum standard of propriety, and the accepted norm of public behavior . . . at least when paraded through a courthouse corridor containing women and children." (Appendix, pp. 29, 34).

C. The Majority Opinion Does Not Answer the Limited Jurisdictional Question Which the Court Itself Has Framed.

This Court's notice of jurisdiction was limited to whether California Penal Code Section 415, *as construed by the California Court of Appeal to apply to*

the facts of this case, was an infringement on the individual rights of Cohen as guaranteed by the First and Fourteenth Amendment. See paragraph 5 of Justice Harlan's opinion reading:

> The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. §1257(2); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

In its opinion construing California Penal Code Section 415, the Court of Appeal (adhering to the common law principles first enunciated in *LeRoy v. Sedley,* 1 Sed. 168 (1688)) had ruled, both as a matter of law and California Statutory construction, that "offensive conduct" as used in the California Penal Code "Breach of the Peace" statute included lewd language, such as "Fuck the Draft" when willfully paraded through a courthouse corridor containing women and children (See Appendix pp. 29, 34). *Amicus* submits that, under the narrow jurisdictional question framed in this Court's notice of jurisdiction, and posed by the rule of law enunciated by the Court of Appeal below, the cavalier statement of the majority opinion to the contrary that "This is not, for example, an obscenity case" does not supply a proper response to the constitutional

issue which is before this Court. Further, in view of the limited jurisdictional question, the Court's circuitous discussion revolving about a canvass of "various matters which this record does not present" is a clear violation of the constitutional duty of this Court as expressed in *United States v. Raines,* 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524, 529 (Feb. 29, 1960):

> The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—"the gravest and most delicate duty that this Court is called on to perform." Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed 2d 60, 73, 74. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies: In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.
>
> Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground

that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . In Barrows v. Jackson, 346 US 249, 97 L ed 1586, 73 S Ct 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation."

D. The Limited Jurisdictional Facts in Cohen, Delineated in Point IC Above, Do Not Present the Larger Question of Whether Convictions Based Upon "Offensive Conduct" of a Type Other Than "Lewdness", Such as in In re Bushman, Would Be Unconstitutional Under the Construction Given the Statute by the Court of Appeal Herein.

At footnote 2 of the majority opinion, the Court considered and rejected the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767; 83 Cal. Rptr. 375, 463 P. 2d 727 (Jan. 27, 1970) in these words:

> [2]The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727 (1970), is it "not at all certain that the California Court of Appeal's construction of §415 is now the authoritative California construction." *Post,* at .... (Blackmun, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:
>
> "[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of §415] if by his actions he wilfully and mali-

ciously incites others to violence or engages in conduct likely to incite others to violence. (*People v. Cohen* (1969), 1 Cal. App. 3d 94, 101, 81 Cal. Rptr. 503.)" 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeals, particularly in light of the *Bushman* court's approving citation of *Cohen*.

That both the majority and minority opinions failed to discern that the *Bushman* opinion as applied to the facts in the *Bushman* case had no bearing on the *Cohen* opinion as applied to the special *Cohen* facts, demonstrates that this Court has overlooked the critical significance of the extremely narrow issue presented herein.

The "offensive conduct" in *Cohen* was of a different type from that which was involved in *Bushman*. In *Cohen*, the "offensive conduct" involved "public lewdness" which, in and of itself, was conduct which was identified and proscribed as a separate offense under state law. As such, it had an objective standard for ascertainment. Accordingly, it was a type of conduct which the Court of Appeal rationally could presume was likely to incite others to violence as a matter of law. See paragraph 4 of this Court's majority opinion reading

"In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace,' and that the State had proved this element *because, in the facts of this case, it was certainly reasonably forseeable that such conduct might cause others*

> *to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket . . .*" (our emphasis).

As noted above in Point IB, this presumption flowing from the nature of the *Cohen* facts has been recognized by our English law for over 300 years.

On the other hand, the petitioner's conduct in *Bushman* is described at page 378 as

> "On the morning of the following day, July 6, 1967, Donald M. Prentice, president of the airport board, convened a meeting of the full five-member board. The roll call was taken and the first three items on the agenda were considered. As the board reached the fourth item, petitioner entered the room, carrying a bucket of gravel in both hands at chest level. Without speaking he walked to the desk where Prentice was presiding. According to the People's evidence petitioner deliberately dumped the contents of the bucket over Prentice's desk and papers . . ."

The *Bushman* conduct was not such as violated any long standing public policy nor was it readily identifiable under objective legal standards. In this light the Court of Appeals rationale in *Cohen* would have no direct application to the *Bushman* facts.

E. Cohen's Conviction Rests Squarely on "Conduct." Speech Is Not an Issue.

This is not the type of case where it could rationally be argued that Cohen may have been convicted for the subjective opinion he communicated regarding the Selective Service System. *Cf.* Justice Harlan's opinion writing for the majority in *Street v. New York*, 394

U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354. There is reason to believe that most judges would share Cohen's subjective distain for the inequities inherent in the system as presently operated, yet those same justices would not, in *amicus'* view, countenance his communicating a message in a "lewd" fashion to innocent bystanders in derogation of the State's policy against public lewdness. Ordinary reason does not support that portion of the majority opinion reading:

> "Thus, we deal here with a conviction resting solely upon 'speech', *cf. Stromberg v. California,* 283 U.S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself . . ."

Even assuming that the right to communicate ideas through speech and press must carry with it the opportunity to win the attention of the public, still the state, under its 10th amendment police powers has the right to regulate the process of winning attention when substantial state interest necessitates protection. See *State of Delaware v. Ceci,* 255 App. 2d 700, 704 (May 29, 1969).

F. This Is a "Breach of the Peace" Case Involving an Underlying Obscene Display.

Contrary to the majority opinion's unsupported assertion, this *is* an obscenity case, in that an obscene display is the basis for the "breach of the peace" charge. That portion of the majority opinion, reading:

> "This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States,* 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket."

misinterprets the function of obscenity laws and the nature of the 10th Amendment right of government to proscribe "public lewdness" which is not so limited. See Motion of Charles H. Keating Jr., herein, at footnote 2.

1. *Under the Common Law, Obscenity, Indecency and Lewdness in the Nature of Cohen's Conduct Were a Public Nuisance.*

Obscenity or indecent exhibitions of a nature to shock the public sense of decency were a public nuisance and indictable at the Common Law. *Crain v. State,* 3 Ind. 193 (1851). In Perkins on Criminal Law, Foundation Press, 1954, Professor Rollin Perkins states, at page 336:

> "Obscene or indecent exhibitions of a nature to shock the public sense of decency are also public nuisances and indictable at Common Law. This label includes not only obscene and indecent theatrical performances or side shows, but other disgusting practices such as letting a stallion to mares in the streets or some other public place. . . ."

For a modern application of this principle, see *Bloss v. Paris Township,* 157 N.W. 2d 260 (Apr. 1, 1968) holding the operation of an outdoor drive-in theater showing motion pictures which "dwell on the subject of sex and the human anatomy" to constitute a public nuisance. In *Bloss,* the Michigan Supreme Court stated the following, as to the nature of such public nuisances, at page 261:

> "What is a public nuisance? Joyce, Law of Nuistances, Section 7, page 15, defines a public nuisance, inter alia, as an act which offends public decency. Cited to Section 66, page 13, is the case of Hayden v. Tucker, 37 Mo. 214, in which it was held that the keeping and standing of jacks and stallions within the immediate view of a private dwelling and a public highway is a nuisance which equity will enjoin as a 'disgusting annoyance perpetually bringing the blush of shame to modesty and innocence.' The factual difference between the Hayden and the instant case, is that there involved was a display of equine and here pictures of the human frame, is not a distinction calling for a different conclusion as to the nuisance question."

Similarly, in *Cactus Corporation d.b.a. The Apache Drive-In v. State of Arizona, ex rel. Murphy,* 480 P. 2d 375 (Feb. 9, 1971), the Court of Appeals of Arizona, Division 2, recently affirmed the judgment of the trial court which permanently enjoined The Apache Drive-In Theater from displaying, showing or running a motion picture film, entitled "Lysistrata", *on any other motion picture film of the same character,* on the grounds that such activity is or would be a public

nuisance as defined by A.R.S. Sect. 13-601, which defines, in part, a public nuisance as:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons. . . ."

At page 378, the Arizona Court of Appeals stated:

> "In the case at bar, there is no necessity for a finding of damage in that the activity in question is a public nuisance per se, which produces such annoyance, inconvenience and discomfort that the law presumes damage. City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938); Engle v. Scott, supra. Such nuisances are malum in se. Even if it is assumed arguendo that the activity is a nuisance per accidens, the burden of showing damage has been met by plaintiff. . . .
>
> "The defendant's third contention is that the trial court's rulings that the activity here was a public nuisance and that it should be abated by injunction were erroneous. We do not agree. A mere reading of the statutes defining public nuisances, A.R.S. Section 13-601 (1956) in light of the facts before us, clearly indicates the correctness of the trial court's characterization of the activity sub judice as that of a public nuisance. . . ."

On March 4, 1971, the Georgia Supreme Court, in an unanimous decision, upheld the *inherent right* of law enforcement officials to enjoin the motion picture film "I Am Curious (Yellow)" as a public nuisance.

In *Evans Theatre Corp. et al. v. Slayton, Dist. Atty. of Fulton County,* ..... Ga. ...., ... S.E. .... (Mar. 4, 1971), Presiding Judge Mobley, speaking for an unanimous court, said:

> "We recognize the principle that equity will take no part in the administration of the criminal law. Code §55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: (Citations).
>
> "The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.
>
> "A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public."

See also *Judson v. Zurhorst,* 30 Ohio Cir. 9, at page 14, where the Ohio court said:

> "There remains one contention for the granting of this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency.
>
> "In a proper case instituted by one legally authorized to represent the public, the public exhibi-

> tion of lewd pictures, immodest statuary, or immoral plays would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mail. . . ."

On the issue of whether indecency in the form of public lewdness in theatrical performances can be stopped in a civil action to abate a public nuisance in California, see *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 Pac. 464 (June 14, 1916). In *Weis*, that issue was before the District Court of Appeals, 2nd District, on a writ of prohibition. The District Attorney had commenced a civil action under Code of Civil Procedure, Section 731, to abate a theatrical performance on the ground that it was a public nuisance. The complaint alleged that under a concession granted by the Panama-California International Exhibition, the defendant was conducting upon the exposition grounds a public resort and place of amusement and entertainment, known as the "Sultan's Harem", in which certain women did make in the presence of the general public a public exhibition and exposure of their naked person and private parts, which performance was alleged to be indecent and offensive to the senses and a public nuisance. The California court dismissed the defendant's application for a preemptory writ holding the action was properly brought. At page 465, the court said:

> "While the acts here complained of clearly constitute a crime, *they also constitute a nuisance within the meaning of Section 3479 of the Civil Code*, which defines a nuisance as 'anything which is . . . indecent or offensive to the senses

. . . so as to interfere with the comfortable enjoyment of life or property. . . .' (Emphasis ours.)

"And Section 3480 of the same Code defines a public nuisance as: 'One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or danger inflicted upon individuals may be unequal.'

"Mr. Joyce in his work on Nuisances, Section 409, says: 'A disorderly and disreputable theater may be enjoined, although a common nuisance.'

"To the same effect is Wood on Nuisances, Section 68, where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.'" (our emphasis)

The *Weis* decision and rationale was cited with approval by the California Supreme Court in *People v. Lim*, 18 Cal. 2d 872, 118 P. 2d 472 (Nov. 27, 1941). In the *Lim* case, the California Supreme Court noted, at page 476:

"Similarly in Weis v. Superior Ct., 30 Cal. App. 730, 159 P. 464, it was held that the District Attorney of San Diego County was authorized under Code of Civil Procedure, Section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisances

in Civil Code Section 3749. . . . The courts have thus refused to grant injunctions on behalf of the state *except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. . . .*" (Our emphasis.)

2. *The Proscription of Obscenity Either Separately or Incident to a "Breach of the Peace" violation Is Grounded Upon the Legitimate Governmental Aim of Controlling and Regulating "Public Morality" i.e., Public Conduct, Which Affects the People as a Whole.*

Obscenity controls do not attempt to reach *private morality* such as what a person may read or see. The proscription of obscenity is grounded upon the legitimate governmental aim of controlling and regulating "*public morality*"—public conduct, which affects the people as a whole.

Law and morality are not identical. Although interrelated, they are necessarily distinct. Not every moral evil is proscribed by man-made laws. *Public* morality is to be distinguished from *private* morality, as to which it is often said, the law does not concern itself. On the other hand, our law has always recognized the importance of maintaining a high *public* morality.

Nowhere was the function of such "vice" laws more clearly stated than in the arguments of the prosecutor two and one-half centuries ago in the first obscenity conviction in *Rex v. Curl*, 2 Strange 789 (1727) (See Point IB herein):

"3. As to Morality. Destroying that is destroying the peace of the government for govern-

ment is no more than public order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; *but if it is destructive of morality in general, if if does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distincition it is that particular acts of fornication are not punishable in the Temporal Courts* (Common Law courts) *and bawdy houses are.* In Sir Charles Sedley's case it was said, that this Court is the custos-morum of the King's subjects. 1 Sid. 168." (Our empahsis).

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows, in 63 Columbia Law Review, Morals Offenses, and the Model Penal Code (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L. Ed. 2d 38, fn. 12; page 39, fn. 14, page 41, fn. 19; *Mishkin v. N.Y.*, 16 L. Ed. 2d 53, fn. 9; and *Stanley*, 394 U.S. 557, fn. 10) at page 671:

> "But the great majority of people believe that the morals of the 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism."

And at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues, at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying, 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraint we seek to cultivate through family, church, and school.' *The interest being protected is not* directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, *but the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our empahsis).

None of the above authorities require that the obscene or lewdness which is being proscribed must be "erotic" as the majority opinion concludes. On the contrary, Mr. Schwartz notes at page 678:

> "It is important to recognize that material may predominantly 'appeal' to prurient interest notwithstanding that ordinary adults may actually respond to the material with feelings of aversion or

> disgust. Section 251.4 explicitly encompasses material dealing with excretory functions as well as sex, which the customer is likely to find *both* repugnant and 'shameful' and yet attractive in a morbid, compelling way . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality,* the United States Supreme Court said in *Mugler v. Kansas,* 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of the state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals,* the public health, or the public safety. . . ." (Our emphasis.)

In 1705 Alexander Pope wrote in simple verse in his quatrain "The Monster Vice", why such vices must be proscribed if good morality is to be maintained:

> "Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."

See also, Federal District Judge Peirson Hall speaking on "The Monster Vice" in *U.S. v. Four (4) Books,* 289 F.Supp. 972, at 973 (Sept. 10, 1968).[2]

The existence of the vice of obscenity and lewdness is the symptom of a disorder which probability tells us, will lead to ruin. Arnold Toynbee, the historian, tells us that 19 out of the 21 great civilizations which flourished in world history, crumbled into ruin . . . not because of armed aggression from without but because of moral decay from within. In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child,* 21 Wallace 441, 450 (1874) had the following to say about the nature of the underpinnings of this Nation:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

In sum, the case for affirmance of the governmental action herein was stated by the United States Supreme Court Justice Harlan in his concurring opinion in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (June 22, 1957), at page 502:

> "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, *the essential character of which is to degrade sex,* will have an eroding effect on moral standards. . . ." (Our emphasis).

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[2]This Court's suggestion that the conduct and four letter words in *Cohen* (*supra*) and *Goldberg* (*supra*) and the conduct and combination of words in *Ceci* (*supra*) have attained constitutional protection lends credence to Judge Hall's suggestion that this Court is being seduced by the increasing amount of pornographic materials it is requiring be placed before it.

Conclusion.

This case should be ordered restored to the docket for reconsideration by way of briefing and further argument on the limited jurisdictional question delineated in Point IC herein, namely: whether the Court of Appeal's construction of the term "offensive conduct" as employed in Penal Code section 415 to encompass lewd displays of language in the corridors of the Court House where women and children were present, as applied to the facts of this case, was an infringement on the individual rights of Appellant as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. In the alternate, this Court's opinion in the case herein should be recalled and the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

CHARLES H. KEATING JR.,
Amicus Curiae.

KEATING, CLANCY, BERTSCH &
JOHNSTON,
Of Counsel.

APPENDIX A.

June 18, 1969

The Clerk
Georgia Supreme Court
Courthouse
Atlanta, Georgia 30300

Dear Sir:

A copy of "Memorandum on Stanley v. Georgia" is enclosed as being of possible academic interest to the Justices of the Georgia Supreme Court, who sat in the Stanley case, recently reversed by the United States Supreme Court.

Yours very truly,

Counsel, Citizens for
Decent Literature, Inc.

MEMORANDUM ON STANLEY v. GEORGIA

The attached Petition for Rehearing in Stanley v. Georgia was prepared by CDL but was not filed in the Stanley case. Before an amicus brief can be considered, a Petition for Rehearing must be on file with the U.S. Supreme Court. Lewis R. Slayton, the District Attorney of Atlanta, was unwilling to file a Petition for Rehearing.

The amicus curiae brief was submitted to the Atlanta District Attorney, who was asked to draw in issue the contraband matter. His feelings against the U.S. Supreme Court were so strong, he said he would not give them an opportunity to rule against him further. There is a reasonable justification for his stand on this matter.

Although there is only a snowball in hell chance in any petition for a rehearing in the U.S. Supreme Court, and probably no better probability that Justices Harlan and Warren would be pulled over to the reasoning of Justices Brennan, White and Stewart, there was some merit in getting these contentions before Justices Harlan and Warren to see if they really understood the opinion that they had subscribed to. There was real merit, however, in carrying the issue back over to the Georgia Supreme Court on remand of that case to that court. If the Georgia Supreme Court had on its own initiative seized the bull by the horns and following Wisconsin v. Voshart, ordered the destruction of the film as contraband in a reported decision, the rationale in Justice Thurgood Marshall's opinion could have been undermined.

Counsel, Citizens for
Decent Literature, Inc.

June 18, 1969

In the Supreme Court of the United States.

October Term 1968, No. 293.

Robert Eli Stanley, Appellant, vs. State of Georgia, Appellee.

AN APPEAL FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

Appellee, State of Georgia, prays that a rehearing be granted of this Court's decision of April 7, 1969, herein, reversing the judgment of affirmance by the Supreme Court of Georgia, dated April 9, 1968, and that the case be ordered restored to the docket for argument on the following questions presented by the jurisdictional statement and the opinion of the Court:

1. Whether a State may, within the limits set by the Federal Constitution, punish as a criminal act the simple possession of obscene materials;

2. Independent of the former consideration, whether a State may, within Federal constitutional limitations, declare such materials to be contraband and subject to forfeiture as against an individual's claim to a right of property therein;

3. Whether a State officer, acting in concert with Federal agents executing a valid Federal search warrant issued for failure to register as a gambler, were constitutionally authorized to examine the contents of three motion picture films not described in the warrant and not related to the investigation therein, which were concealed in a desk drawer of appellant's home.

Dated:

Attorney for Appellant

REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR RE-ARGUMENT

I.

The Majority Opinion Is In Error in Holding That An Individual Has A Personal Right, Superior To That Of The State "To Read", "To Possess", And To Satisfy One's "Emotional Needs" With Obscene Motion Picture Films, Under Circumstances Where The State Legislature Has Acted To Treat Such Materials as Corruptive Of The Common Good And Not Subject to Lawful Ownership (Contraband).

The majority opinion analysis fails to take into consideration the fact that there are two separate and distinct principles involved in the Georgia legislation. Stated as issues they are:

1. May a State, within the limits set by the Federal Constitution, punish as a criminal act the simple possession of obscene materials, and

2. *Independent of the former consideration,* may a State, within Federal Constitutional limitations, declare such materials to be contraband and subject to forfeiture as against an individual's claim to a right of property therein?

The distinction between these two issues is the difference between (1) a criminal law motion to suppress such materials as evidence in the criminal trial, and (2) a motion made at the same time or later, based upon property rights, to restore the ownership of such property as against a claim of forfeiture by the State as contraband. In its decision on the first

issue denying the State of Georgia the right to exact a criminal law penalty based upon simple possession, the language of the majority opinion runs aground for, among other reasons, lack of attention to the concomitant property law questions present in the second issue. Without having considered the matter in depth, this Court's rationale draws in question the right of Georgia to destroy the obscene motion picture films as contraband and to regard the same as not subject to lawful ownership.

As far as amicus is able to determine, there is nothing flowing from any case law interpreting the Federal Constitution which accords to an individual a property right superior to that of the community relative to the possession of obscene motion picture films. Nevertheless, this Court's reasoning on the criminal law issue dealing with "simple possession" seems to accord to the defendant a property right in defeasance of the State's declared public policy that obscene motion picture films are not subject to ownership and are contraband as a matter of law. The majority language in this regards reads as follows:

> "It is now well established that the Constitution protects the right to receive information and ideas. *'This freedom (of speech and press) . . . necessarily protects the right to receive. . . .' This right to receive information and ideas, regardless of their social worth,* see Winters v. New York, 333 U.S. 507, 510 (1948), is fundamental to our free society. . . .
>
> "These are the rights that appellant is asserting in the case before us. *He is asserting the right to satisfy his* intellectual and *emotional needs* in the

privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. *Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not . . . even possess.* Georgia justifies this assertion by arguing that the films in the present case are obscene. *But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. . . .*" (Our emphasis.)

Unless the rationale of Roth-Alberts is to be completely disregarded, the reasoning of this Court on the property rights involved is clearly in error and for the following reasons:

This Court's opinion in Stanley was not written in a vacuum as the above language would suggest, nor may this Court treat the same as such. United States v. Raines, 362 U.S. 17, 21 (1960) stands for the contrary proposition:

> "This Court, as in the case of all Federal Courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it: the other, never to formulate a rule of constitutional law broader

than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U.S. v. Wurzbach, 280 U.S. 396."

The language of the majority opinion in Stanley, objected to above, and the whole of that majority opinion is premised upon one fundamental fact—*the three motion picture films which are the subject of this Court's concern are under prevailing constitutional standards uncontrovertibly obscene as a matter of law*. The Atlanta District Attorney refers to them as stag films (Appellee Brief on the Merits, at pages 18, 19) and describes their contents as:

"These films . . . are not literature in any sense of the word. They contain no plot, no dialogue, no moral lesson, no insight into contemporary social customs or mores, or any other redeeming social value. They are . . . only for lustful private showings . . . . They consist of nothing except close-up scenes of seduction, display of male and female genitalia and pubic regions, oral sodomy and sexual intercourse in a variety of positions. Thus we feel the films are pure obscenity. . . ."

This Court and the litigants were unanimous in their agreement that the District Attorney's evaluation was correct. At footnote 2, the majority opinion under-

pinned its rationale upon an acknowledgment that the films were obscene as a matter of law:

> "Appellant does not argue that the films are not obscene. *For the purpose of this opinion, we assume that they are obscene under any of the tests. . . .*" (Our emphasis.)

The Court having adopted this premise, there is much more concerning the nature[1] of the motion picture films which, under Ruling Case Law, is not open to question or the proper subject of debate by this Court. By their nature, it must follow that the subject motion picture films (1) are utterly without redeeming social importance, and (2) are without First Amendment protection because they are utterly without redeeming social importance. In 1957 the majority in Roth-Alberts viewed this as being in the order of a "universal judgment". The paramount interest *then* was the Government's interest in "order and morality". See 354 U.S. 576, at 585, where the Roth court said:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from

[1]The majority opinion consistently seeks to distinguish the facts in Stanley from those in Roth-Alberts so as to disengage itself from the limits imposed by the latter decision. While the fact of simple possession in Stanley may be distinguished from the fact of commercial possesssion in Roth-Alberts, no such distinction can be drawn to avoid the specific holding in Roth regarding the nature of obscene materials, i.e., their lack of tangible worth.

1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 86 L.Ed. 1031, 1035, 62 S.Ct. 766:

> " 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such light social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'
>
> "We hold that obscenity is not within the area of constitutionally protected speech nor press."

This Court cannot avoid the Roth language above, which places materials which are obscene *as a matter of law* in the same class of property as "narcotics", "firearms", or "stolen goods". Such materials may be regarded by government as incapable of ownership and subject to forfeiture. Nevertheless, this Court at footnote 11 draws a distinction without reason other than "First Amendment rights are involved" . . . yet this was the very opposite premise adopted by the Court at the start of its opinion.

If the above rationale in Roth-Alberts is still the law, it can hardly be said that a State under the powers reserved to it by the Ninth and Tenth Amendments may not, within constitutional limits, declare such matters to be incapable of ownership and contraband, as against an individual personal claim to a right of own-

ership. In this light, it seems inescapable to amicus that the language of the majority opinion reading:

> "But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments"

is clearly erroneous.

We further believe that the Court's invocation of "First and Fourteenth Amendment" rights is not justified. The concurring opinion of Stewart, Brennan, and White correctly labels the constitutional principle involved in this case. If simple possession (without more) of motion picture films which are obscene as a matter of law may not be made a crime, it must turn on the Fourth Amendment right to privacy which is a right to one's solitude. This right to one's solitude is the antithesis of the First Amendment right which is a right to communicate with others (free speech and press). At least under this analysis, the Court does not find itself in the unconscionable position of reconstructing the positive values reaffirmed over 12 years ago in the Roth-Alberts opinion.

The right of government to destroy obscene motion picture films as contraband as against the claims of an individual to possession thereof was recently before the Wisconsin Supreme Court in State v. Voshart, 159 N.W. 2d 1 (June 7, 1968), on almost identical facts. There, certain motion picture films had been seized under a search warrant and their possessor charged with two counts of obscenity: (1) intentionally having in his possession obscene motion picture film (simple possession) and (2) intentionally having in his possession such film for sale or exhibition (commercial possession). In Voshart however, the trial court granted a motion to

suppress the evidence based upon the invalidity of the search warrant the criminal complaint against him was dismissed as to both counts. Following dismissal of the criminal charge, the defendant filed a motion for return of the obscene motion picture films and the State moved for destruction of the film as contraband. As here, it was conceded that the film was obscene. The Wisconsin Supreme Court in ruling upon the petitioner's claim to a right of possession adopted the reasoning of the Wisconsin trial court, at page 10:

> "It seems very clear to us that when contraband articles . . . to which no one can have a property right, are found in an illegal search, they should not be returned to the persons from whom they were taken. . . ."

Unlike the majority of this Court, the Wisconsin Supreme Court did not recognize any superior right in an individual "to read", "to possess", and to satisfy one's "emotional needs" with obscene motion picture films. Instead the Court adopted what amicus feels is the only course open in our Judeo-Christian Anglo Saxon tradition, namely, at page 9:

> "Under its police powers, as a matter of public policy, the Legislature may declare to be contraband property that menaces public health, safety and morals. The right to destroy contraband property includes property such as counterfeit money, diseased cattle, contaminated food, and gambling devices. We would sustain the right of the Legislature to place obscene materials in this same category. This is not a case of an innocent article put to an illegal use. It is as impossible to separate the contamination from the flood or the gambling from the device. . . ."

II.

The Philosophy Espoused by the Majority Opinion Undermines Roth-Alberts and Is Destructive of Public Morals.

This Court is sorely in need of a moral voice in the tradition of the late Associate Justice Noah H. Swayne of the United States Supreme Court:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our Government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. . . ." Associate Justice Noah H. Swayne speaking in Trist v. Child, 21 Wallace 441 (1874).

Or Justice Radcliffe of the Ohio Supreme Court:

> "There is an oft-quoted cliche to the effect that it is not possible to legislate in the field of morals. The statement originally was and still should be 'it is not possible to legislate morality for the people.' We sorrowfully agree that this is so, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to tray. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative

bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the Government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citus tolerare vult privatum damnum quam publican malum (The law will rather permit a private loss or damage than a public evil)." Justice Radcliffe speaking for the Supreme Court of Ohio in State of Ohio v. Jacobellis, Jan. 17, 1962.

Or the late Justice W. Turney Fox of the California District Court of Appeal:

"The effect of such 'literature' is to dull the moral sensitivity of many, if not most of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetites

and cast aside decent standards of behavior." Justice Fox speaking for the District Court of Appeal in People of the State of California v. Williamson, 24 Cal. Rptr. 734 (Sept. 26, 1962).

Or the late Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court:

"Prohibition against obscenity is not only a matter of cleanliness and godliness; the health of the community is involved. It has been established in thousands of cases that there can be a direct connection between abnormal sex books and sex crimes. Those who profess not to see this connection are either abysmally ignorant or refuse to accept the truth. . . .

"Why have there been laws against obscenity reaching back into the days of antiquity? It is because obscenity, lewdness, lasciviousness strikes at the very moral fibre of the people and, when that disintegrates, a nation perishes. Justice Harlan said in the Roth-Alberts case . . . that 'the state can reasonable draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.' We know that Rome was great and went into decline; that Greece was the flower of culture, and that weeds finally grew in the Acropolis; that the Persian, Egyptian, Babylonian and numerous other civilizations were powerful, rich and indominable but something happened to them and they moldered into decay, not because of armed invasions from without their gates, but from moral deterioration within their

> own walls. . . . ." Associate Justice Michael A. Musmanno dissenting in Commonwealth of Pa. v. Del Publications, Inc., 233 Atl.2d 840 (June 29, 1967).

For lack of the same, we find the rankest order of obscenity inundating this Nation and reproducing itself out of the fission set into motion by this Court's obscenity decisions. The demoralizing force that obscenity exudes is everywhere. It fills our novels, paperbacks, still pictures, magazines and phonograph records, and has spilled over into and flooded our motion picture films, drama, beer bars, nightclub acts, campus dialogue and campus newspapers.

More disturbing to amicus than this Court's interference with the sincere efforts of the State of Georgia to meet this problem is the tenor of the language and philosophy supporting the majority opinion. It is our firmly held conviction that the No. 1 cause of this Nation's present monumental obscenity problem is the continuing refusal, as here, of certain members of this Court to accept the basic Judeo-Christian, Anglo Saxon philosophy which underpins the Roth-Alberts decision. We did not believe that Justice Harlan and Justice Warren, both of whom concurred in Roth-Alberts and have given support to the people's cause, could bring themselves to join in all the opinion said.

There is a very determined campaign afoot in this Court to diminish and avoid the Roth holding, a movement which is contrary to the overwhelming sentiment of the state legislatures, juries and courts which make up this Nation. The Kentucky Court of Appeals succinctly expressed this sentiment in its recent decision

in Cain v. Commonwealth of Kentucky, ... Ky. ..... (Feb. 14, 1969):

> "The Supreme Court of the United States held in the Roth case that obscenity is not protected by the First and Fourteenth Amendments to the Constitution of the United States. As far as we have been able to determine, this holding has never been reversed or modified. The Court has occupied itself since that ruling in a somewhat futile attempt to determine what is obscene and what is not obscene. This problem has given the judiciary of this country the greatest challenge of its history and as of the date of this opinion the judicial record reflects nothing more than indecision and failure.
>
> "While the courts have vascillated and overexplained, divided and fought, the sentiments of the people of this country have been clear and unassailable. . . . *It seems to be universally believed everywhere, except in the halls of the judiciary, that obscenity as such is not entitled to the constitutional protection awarded free speech.*
>
> "Many times the right to pose a question is tantamount to the right to answer or at least partially so. Down through the years we have been asking ourselves when dealing with pornography and obscenity, 'is it harmful'. Of course this answer cannot come without a certain amount of reservation because the proof is hard to come by and often inconclusive. Therefore, we keep asking the same question and getting th same answers with reservations. If we were to change the form of the question asked 'is it beneficial', the answer would come loud and clear. Certainly no

benefit can come to any individual or any society by the use of dissemination of pornographic and obscene material. *This being so, why should we longer expend the time and energy of the greatest minds of this country in preserving its presence upon the newsstands and in the theaters?* It is our opinion that the jury had sufficient evidence before it to hold the film obscene." (Emphasis ours.)

In undercutting the Georgia Supreme Court decision to uphold the will of the State Legislature and findings of the jury as they relate to the facts in this case, the majority employs language which strikes at the very root of the Roth-Alberts decision. In this regard, the majority opinion says:

> "And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the asserting that the state has the right to control the moral content of a person's thoughts."

We fail to see why the majority should think it so incredulous that one would assert that the state has the right to legislate so as to control the moral content of a person's thoughts in matters relating to sexual morality. See the opinion of Justice Ratcliffe speaking in Jacobellis v. Ohio (supra). This was the very issue argued and decided in Roth-Alberts. The Roth-Alberts Court approved a jury instruction in Roth which read: "Obscene, Lewd and lascivious as used in the law, signified that form of immorality which has relation to sexual impurity and has a tendency to excite lust-

ful thoughts." It also approved the Alberts' test for obscenity, namely, "Whether the material has a substantial tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desires." It is for this very reason that the State of Wisconsin declared obscene materials to be contraband and subject to forfeiture. Wisconsin v. Voshart, 159 N.W.2d 1, 9. Recognizing that obscenity is a menace to the public health and morals, the Wisconsin Supreme Court acted in the interests of the common good to deprive Mr. Voshart of what communications such obscene motion picture films had to offer to him personally.

Continuing along this line of reasoning, the majority opinion in Stanley collaterally attacks the Roth-Alberts foundations:

> "To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in Kinglsey International Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959), 'This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are convention or shared by a majority . . . and in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See Winters v. N.Y., supra, 333 U.S. at 510."

The effect of such an interpretation is to breed the ideas expressed by Justice Stewart's opinion in Kingsley International Pictures, Inc. v. Regents, 360 U.S. 680 (which the majority interpret as guaranteeing *every* expression—including, by inference, those which "deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desires") to a first impression interpretation of First Amendment rights (which the majority interpret as guaranteeing the reception of every such expression) to arrive at a progeny which most assuredly contravenes the Roth-Alberts principle.

We cannot understand how Justice Harlan could bring himself to join in Justice Thurgood Marshall's opinion, where, its language expressed above, is at odds with what he has been saying these past 12 years, beginning with Roth-Alberts, supra, and extending to Interstate Circuit, Inc. v. Dallas, 20 L.Ed.2d 225 at 245 (Apr. 22, 1968). Its philosophy is a complete negation of his expressions in Roth-Alberts at page 501:

> "I concur in the judgment of the Court in No. 61, Alberts v. California.
>
> "The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a 'tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire.'

"In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgment under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the state is wise, or whether it is based on assumptions scientifically substantiated. We can require only whether the state action so subverts the fundamental liberties implicit in the due process clause that it cannot be sustained as a rational exercise of power. . . .

"What, then, is the purpose of this California statute? Clearly the State Legislature has made the judgment that printed words *can* 'deprave or corrupt' the reader—that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime or delinquency. Others disagreed. Clearly it is not our function to decide this question. That function belongs to the State Legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational in our present state of knowledge to consider that pornography can induce a type of secual conduct which a state may deem obnoxious to the moral fabric of society. In fact the very division of opin-

ion on this subject counsels us to respect the choice made by the state.

"Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the state may be protected by the prohibition placed on such materials. The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . .

"Since the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the due process clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt' a reader."

Assuming Justice Harlan would be satisfied with the state action in Wisconsin v. Voshart, which would destroy the films as contraband, we ask whether he can adhere to this Stanley majority opinion and still reconcile its language with the Voshart reasoning.

Having succeeded in undermining the Roth foundation in the above collateral attack, the majority opinion proceeds to directly attack Roth-Alberts by downgrading its importance. The majority language reads:

"Whatever may be the justification for other statutes regulating obscenity. . . ." and

"Whatever the power of the state to control public dissemination of ideas innimicable to the public morality. . . ." and

"It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. . . . (354 U.S. at 486, 487) But that case dealt with public distribution of obscene materials and such distribution is subject to different objections."

We recognize that under our Anglo Saxon criminal law a traditional distinction is drawn between those community police actions which are necessary to the common goods, and others which cannot be so classified, being purely and simply an interference with private sins.

This proposition has seldom been so ably stated as by the English court in Rex v. Curl, 3 Q.D.D. 619 (1727) dealing with the first obscenity crime in Anglo Saxon law:

"As to morality. Destroying that is destroying the peace of the Government, for Government is no more than public order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? I do not insist that every moral act is indictible, such as telling a lie or the like, but if it is destructive of morality in general, if it does, or it may affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the temporal courts, and bawdy houses are. . . ."

The majority opinion in Stanley, however, has absolutely none of the flavor of the prosecutor's arguments in Rex v. Curl.[2] To the contrary the majority opinion states:

> "More importantly, if the State is only concerned about literature inducing antisocial conduct, we believe that in the context of private consumption

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[2]Nor does the argument of the State of Georgia admit that this is a case of a simple "lie" or the fact of "fornification" discussed in *Rex v. Curl.* See Appellee's Brief on the Merits at pages 9 and 31:

> "Appellant made a very brief unsworn statement to the jury in which he said he is a bachelor, living alone and has a girl friend. He planned a Labor Day Party, invited several couples out, and a friend (whom he did not identify) came by and gave him three rolls of film, saying he wanted appellant to see it. Appellant said he put the film in a desk drawer and had completely forgotten about it until informed by the officers thay they were arresting him for it. . . ."
> "One of the cans of film bears the homemade and suggestive label 'Young Blood'. When the officers arrived two men were in appellant's backyard. While the search was in progress, another man and three women arrived at appellant's home. A table was set for eight and three dozen biscuits were ready for cooking. This added up to a total of seven persons, four men and three women, including appellant at his home that night (apparently one woman was tipped off that the party was off because of the presence of the officers and did not make her appearance). The film was scratched, dirty, and one reel was wound backwards, indicating recent viewing. Appellant made no comment whatever when told he was under arrest for the obscene film found upstairs. . . ."
> "His unsworn statement, together with reasonable inferences drawn therefrom, would support a finding that after he planned his Labor Day Party and invited several couples, someone (he said a friend—whom he did not identify) brought the films by with the suggestion that he would view them. The obvious inference is that they were to be shown at the party, to four couples, including himself. It is further a reasonable inference that he either would have viewed them himself prior to the party, or would have been informed by his generous friend of the general nature of the films. . . ."

Apparently the jury agreed with the Atlanta District Attorney, having elected not to recommend the matter be punished as a misdemeanor, as was its right under the law.

> of ideas and information we should adhere to the view that 'among free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law' . . . given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the grounds that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . ."

Amicus does not believe that innocent personal possession (personal sin) should be made a crime, but it would seem that, in view of the present state of proliferation of obscenity, even that choice should be left open to the State Legislature and State courts—especially where the subject matter is vile films of the sort herein considered. A step away from innocent personal possession is, in our view, possession with intent to show at "swinging" parties as argued here on the facts by the Atlanta District Attorney. Surely that is a matter of "public morals" within the cognizance of the criminal court. A simple analysis of the available means of establishing proof of either of these factual situations would seem to focus on the Fourth Amendment right to privacy, as the only constitutional right involved in such cases.